BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH R. PALMER Claimant VS. **OCCIDENTAL CHEMICAL CO.** Respondent AND **AMERICAN HOME ASSURANCE CO.** **COMMERCE & INDUSTRY INS. CO.** Insurance Carriers AND/OR **VULCAN MATERIALS CO.** Self-Insured Respondent	)	Docket No. 1,027,925

ORDER

Respondent, Occidental Chemical Co., and its insurance carrier, American Home Assurance Co., request review of the August 16, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant aggravated a previous condition in his low back with Occidental Chemical Co. and therefore the injury arose out of and in the course of that employment.

The respondent, Occidental Chemical, and its insurance carrier, American Home Assurance Co., request review of whether the claimant's accidental injury arose out of and in the course of their employment. Respondent argues there is no substantial competent evidence to support that claimant had a new injury on July 10, 2005, which caused the current need for medical treatment. Instead, Occidental argues that claimant's condition is a natural and probable consequence of a previous injury claimant suffered working for Vulcan Materials.

Respondent, Vulcan Materials Co., notes the claimant settled his 1994 low back injury claim on April 23, 1997, with rights to future medical left open. But Vulcan argues that claimant has alleged a July 10, 2005, and each and every day date of injury thereafter all of which occurred after Occidental Chemical bought the plant from Vulcan on June 7, 2005. Consequently, Vulcan argues it should be dismissed from this matter.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Mr. Palmer began working for Vulcan Materials on January 3, 1977. He was injured in 1994 when he was driving a switch engine which was hit in the rear end. Respondent provided medical treatment with Dr. Steven R. Hughes, the company's physician, and claimant returned to light-duty work with restrictions of no lifting greater than 50 pounds, no squatting, kneeling, ladders or stairs. Claimant and Vulcan settled the 1994 low back injury claim on April 23, 1997, with rights to future medical left open.

Vulcan Materials was purchased on June 7, 2005, and the name was changed to Occidental Chemical Co. Claimant continued working for Occidental. He worked as the lead technician in the drum filling warehouse. His job duties included filling 300-pound drums with perchloreoethylene and then removing them with a forklift from the line. Claimant testified:

> Q. And when you were injured can you tell the Court what occurred on approximately July 10, '05?
>
> A. Driving a forklift out in our court yard out in the front and one of the wheels of the back dropped off in a hole and there was no suspension on those and it was just a dead solid hit that jarred my back, jammed my back up.
>
> Q. Did you immediately know that you had an injury to the back?
>
> A. Yeah, it was very painful.
>
> Q. Did you report that injury?
>
> A. Yes, to Richard Parks, that was my foreman at the time.[1]

[1] P.H. Trans. at 12.

Claimant sought treatment on his own with Dr. Hughes, the company physician. Dr. Hughes prescribed medications and continued claimant on his prior permanent restrictions. Claimant continued to work from July through October 2005, until he could hardly walk. The claimant's last day worked was October 25, 2005. Claimant testified that after his injury on July 10, 2005, he had an increase of constant pain in his lower back and down into his right leg as well as numbness in his hand and fingers. He noted that his areas of pain were different than what he had after the 1994 accident.

Joel Barber, claims manager, later referred the claimant to Dr. Paul S. Stein. As a result, claimant again saw Dr. Hughes on October 25, 2005. Dr. Hughes continued claimant on medications, scheduled an MRI and continued his previous restrictions until claimant was seen by Dr. Stein.

After the July 10, 2005 incident, when the claimant sought treatment with Dr. Hughes, he testified that he told Dr. Hughes that he had re-injured his back but did not recall telling the doctor how he had hurt it. The doctor's record of that visit indicated claimant had increased low back pain after an increase in repetitive work activity. The claimant described his repetitive activity in the following fashion:

> Q. What repetitive work were you doing for the roughly ten days or so before July 11?
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> A. At that time I was driving the forklift continuously all day because I still was loading trailers, and that sort of thing, with the drums driving in and out with the forklift, that sort of thing. They had sold out of the dry cleaning business, and I was doing a lot of moving outside and the old drums, damaged drums, stuff like that, over to a drum pressure and driving a forklift daily.[2]

When claimant saw Dr. Stein he stated he told the doctor about the new injury and that the pain was different and more pronounced. Claimant testified:

> Q. Now, Dr. Stein in his report said that you had not discussed with him any injury of July 10th or 11th of '05, is that a fair statement?
>
> A. I am sure I told him that it was new.
>
> Q. And did you tell him though that you were in there because of the injury of driving the forklift?
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> A. Yes.[3]

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[2] *Id.* at 24.

[3] *Id.* at 16.

In his October 31, 2005 report, Dr. Stein opined:

> [W]ithin a reasonable degree of medical probability, the chronic symptomatology that Mr. Palmer has had since 1994 is related to aggravation of preexisting disease at L3-L4 by his injury. The more acute, recent, right lower extremity symptomatology is more likely related to progression of the degenerative disease itself than to the old injury.[4]

Occidental argues that claimant has not met his burden of proof that he suffered a new injury and instead, as noted by Dr. Stein, his current pain is a natural consequence of the degenerative disease in his spine. This Board Member disagrees.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[5] In this instance, the claimant had sporadic back problems after his 1994 injury but had last sought treatment in August 2004. It was approximately a year later when the incident with the forklift occurred and claimant returned to see the physician. Moreover, it is uncontroverted that claimant reported the incident to his supervisor. And he described different symptoms and pain, such as the hand numbness, as compared with the sporadic pain recurrences after the 1994 injury.

On July 11, 2005, Dr. Hughes noted the claimant's onset of back pain was due to an increase in repetitive work activities. While it is noteworthy that there is no report of the forklift incident, nonetheless, the claimant attributed his increased back pain to driving the forklift and was primarily concerned with getting some relief from his pain. And this Board Member is mindful that Dr. Stein's report indicates no new accident but claimant testified that he specifically told the doctor about his new accident.

This Board Member finds claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[4] *Id.*, Resp. Ex. B.

[5] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[6] K.S.A. 44-534a.

as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 16, 2006, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of October 2006.

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BOARD MEMBER

c: Mel L. Gregory, Attorney for Claimant
D. Steven Marsh, Attorney for Occidental Chemical & American Home/Commerce
Larry Shoaf, Attorney for Vulcan Materials Co.
John D. Clark, Administrative Law Judge

[7] K.S.A. 2005 Supp. 44-555c(k).